FILE COPY

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1952

No. 366

UNITED STATES OF AMERICA, EX REL. JOSEPH ACCARDI, PETITIONER,

vs.

EDWARD J. SHAUGHNESSY, DISTRICT DIRECTOR OF THE IMMIGRATION AND NATURALIZATION SERVICE, NEW YORK DISTRICT, DEPARTMENT OF JUSTICE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

FILED SEPTEMBER 23, 1952

CERTIORARI GRANTED NOVEMBER 10, 1952

SUPREME COURT OF THE UNITED STATES

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

INDEX

BLEED THROUGH-

[fol. 1]

IN UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, ex rel., JOSEPH ACCARDI, Relator-Appellant,

against

EDWARD J. SHAUGHNESSY, District Director of the Immigration and Naturalization Service, New York District, Department of Justice, Respondent-Appellee

STATEMENT UNDER RULE 15b

This is an appeal from an order of the Honorable John W. Clancy, United States District Judge, entered on May 16, 1953, denying the petition for a writ of habeas corpus herein.

Oral argument by counsel for the respective parties herein was presented in open court on May 16, 1953. No testimony was taken on the allegations of the petition. This appeal from the aforesaid order was taken on May 16, 1953.

There has been no change of parties or attorneys.

[fol. 2] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, ex rel., JOSEPH ACCARDI, Relator,

against

EDWARD J. SHAUGHNESSY, District Director of the Immigration and Naturalization Service, New York District, Department of Justice

WRIT OF HABEAS CORPUS REFUSED—May 16, 1953

THE PRESIDENT OF THE UNITED STATES

to

EDWARD J. SHAUGHNESSY, District Director of the Immigration and Naturalization Service, New York District, Department of Justice

We command that you have the body of Joseph Accardi, by you imprisoned and detained, as it is said, together with

the time and cause of such imprisonment and detention, by whatever name it shall be called or charged before the District Court of the United States, in and for the Southern District of New York, at a stated term thereof, to be held at Room 506, United States Courthouse, Foley Square, Borough of Manhattan, City of New York on the 21st day of May, 1953, at 10:00 o'clock in the forenoon of that day [fol. 3] or as soon thereafter as counsel can be heard, to do and receive what shall then and there be considered concerning the said relator, Joseph Accardi, and have you then and there this writ.

Witness, the Hon. John C. Knox, Chief Judge, United States District Court for the Southern District of New York.

———— ————, Clerk of the United

—— ——, Clerk of the United States District Court for the Southern District of New York.

The foregoing writ is hereby allowed this day of May, 1953.

—— ——, United States District Judge.

Memo endorsed "This writ is refused."

John W. Clancy, U.S.D.J., 5/16/53.

IN UNITED STATES DISTRICT COURT

PETITION FOR WRIT OF HABEAS CORPUS—May 15, 1953

The petition of Joan Accardi respectfully shows:

1. I am the wife of Joseph Accardi, the relator herein, who is presently being imprisoned and detained within the [fol. 4] Southern District of New York by Edward J. Shaughnessy, District Director of the Immigration and Naturalization Service of the New York District.

2. My husband, Joseph Accardi, is a native and citizen of Italy, 42 years of age.

3. My husband, Joseph Accardi, last entered the United States during August, 1932, and has remained here ever since.

4. On April 3, 1953, the Board of Immigration Appeals affirmed an order of deportation against my husband upon

the ground that he entered the United States in 1932 without an immigration visa.

5. The Board of Immigration Appeals refused to exercise favorable discretion to permit my husband to remain here in the United States as a permanent resident.

6. My husband has been living in the United States for a period of twenty-one years. He is lawfully married to me; and I am a lawful resident of the United States. We have an American born child who was born to us in 1951.

7. My husband has been a person of good moral character for the past ten years and during this period has not been in conflict with the law.

8. In all similar cases the Board of Immigration Appeals has exercised favorable discretion and its refusal to do so [fol. 5] herein constitutes an abuse of discretion.

9. That on April 6, 1945, favorable discretionary relief was exercised herein in the form of voluntary departure and preexamination, but my husband was unable to take advantage of this because the American Consul refused to issue a visa to him on the ground that he had been convicted of a crime in 1934.

10. That the aforesaid criminal ground may be waived by the Board of Immigration Appeals and in all similar cases has been waived by the Board of Immigration Appeals.

11. Upon information and belief that the Department of Justice maintains a confidential file with respect to my husband.

12. Upon information and belief that on or about October 2, 1952, the Attorney General announced at a press conference that he planned to deport certain so-called "unsavory characters."

13. That upon information and belief, on or about October 2, 1952, the Attorney General prepared a list of one hundred individuals whose deportation he sought in accordance with the announcement made at his press conference of October 2, 1952.

14. Upon information and belief, that included in this list of one hundred persons was the name of my husband, Joseph Accardi.

[fol. 6] 15. Upon information and belief, that the aforesaid list of one hundred individuals, including the name of my husband, was circulated by the Department of Justice

among all its employees connected with the Immigration Service and the Board of Immigation Appeals.

16. Upon information and belief, that because of the listing of my husband's name on this confidential list and because of consideration of matters outside the record of his immigration hearing, discretionary relief has been denied to permit my husband to adjust his immigration status to that of a permanent resident.

17. That application was made during the month of May, 1953, for reconsideration of my husband's case and such reconsideration has resulted in a reaffirmance of the order of deportation herein.

18. Upon information and belief that the Attorney General has issued several press releases with regard to my husband's case during the month of April, 1953, and because of the unfavorable publicity accorded to this case at the instigation of the Attorney General, it has not been possible to secure a fair reconsideration and rehearing of this matter.

19. That the decision to deny favorable discretionary relief herein was pre-judged by the Attorney General on [fol. 7] October 2, 1952, when he included my husband's name in the list of one hundred so-called "unsavory characters" and since that time it has been impossible for my husband to secure fair consideration of his case.

20. That the present Attorney General has continued the policies and practices of his predecessor with reference to my husband's case.

21. That the deportation order entered herein and the order denying favorable discretionary relief is null and void, violates due process, and should be set aside.

22. That no previous application for the relief prayed for herein has been made to any court or judge thereof except that a previous writ was issued on April 22nd, 1953, and was denied after hearing by Judge Noonan.

23. That the previous writ did not set forth any of the facts herein concerning the prejudgment of the case, the use of confidential material in violation of law and the unfavorable publicity and lack of due process as alleged herein.

24. That in view of these entirely new allegations which

are set forth herein it is believed that the instant writ should issue.

Wherefore it is respectfully prayed that the within writ of habeas corpus be allowed.

[fol. 8] Dated, New York, May 15, 1953.

(S.) Joan Accardi.

Duly sworn to by Joan Accardi; jurat omitted in printing.

[fol. 9] In United States District Court

Opposing Affidavit

State of New York,
County of New York,
Southern District of New York, ss:

William J. Sexton, being duly sworn, deposes and says:

I am an Assistant United States Attorney in the office of J. Edward Lumbard, United States Attorney for the Southern District of New York and, as such, I am in charge of and am familiar with the above captioned proceeding.

This affidavit is made in opposition to petitioner's application for the issuance of a writ of habeas corpus herein. This affidavit is based upon the records of the Immigration and Naturalization Service which are incorporated herein by reference with the same effect as if set forth herein in full.

The relator herein, in whose behalf a writ of habeas corpus is sought, previously sued out a writ of habeas corpus in this Court under Civil No. 84-269. A return to that writ of habeas corpus dated April 24, 1953, was duly filed and the same came on to be heard before the Honorable Gregory F. Noonan, United States District Judge. On April 30, 1953, Judge Noonan dismissed the writ of habeas [fol. 10] corpus by a memorandum opinion endorsed on the record. On May 5, 1953, a formal order dismissing the prior writ was duly made and entered in this Court. A copy of the respondent's return to the previous writ of habeas corpus, the memorandum decision of the Court and the order dismissing the writ of habeas corpus have been

attached to the administrative record and are likewise incorporated herein by reference.

Since the dismissal of the aforesaid writ of habeas corpus there has been no change of facts or circumstances except that the relator made a motion to the Board of Immigration Appeals for reconsideration of his case and on May 8, 1953, that motion was administratively denied. In effect, relator now seeks to raise the same issue which he sought to raise in the prior writ of habeas corpus proceeding. He now again challenges the propriety of the denial of his administrative application for a "pardon" from deportation in the form of suspension of deportation. The present petition for the issuance of a new writ of habeas corpus merely attempts to raise some additional arguments which were fully available to the relator in the prior proceeding, but which, for reasons not now explained, he did not urge in the prior proceeding. The principal ground for opposing the allowance of the present writ of habeas corpus is based upon the contention that controlling weight should be given [fol. 11] to the dismissal of a prior writ of habeas corpus based on substantially the same issue. *United States ex rel. Karpathiou* v. *Jordan*, 153 F. 2d 810, cert. den. 328 U. S. 868, rehearing denied 329 U. S. 821; *Wong Doo* v. *United States*, 293 F. 273, which affirmed *Wong Sun* v. *Fluckey*, 283 F. 989.

The Immigration and Naturalization records clearly and unequivocally show that the final decision denying discretionary relief to the relator was based on the record of his case and on the numerous unfavorable factors appearing therein. There is no substance to the relator's pretended claim that the decision was based on information outside of the record. Nor does the fact that this case has received some small degree of publicity have any bearing upon the merits or issues in the deportation proceedings. As a matter of fact the initial administrative decisions adverse to the relator were made long before any publicity of any kind was connected with this case. Finally, it is emphatically denied that the Board of Immigration Appeals has uniformally granted discretionary relief to aliens similarly situated. It has always been the practice of that Board to consider the individual merits of every case and the unfavorable factors considered in this case are

unique to the particular case. In any event, the decision [fol. 12] of the Board, on the merits, as an exercise of discretion is not subject to judicial review and intervention, as has already been held by the decision of Judge Noonan on the prior writ of habeas corpus.

The relator's contention that the merits of his case were pre-judged by the administrative authorities is equally frivolous, since he conceded the facts upon which the order and warrant for deportation were based and raised no defense to the deportation charge. The only issue in the entire proceeding was the question of whether the case was sufficiently meritorious to warrant the extraordinary form of discretionary relief, suspension of deportation. An administrative "pardon" from deportation is a matter of grace; it is a privilege which is not surrounded by the usual requirements of due process of law. It is an area of administrative action over which the courts have no power of review. *United States ex rel. Kaloudis* v. *Shaughnessy,* 180 F. 2d 489, and cases cited therein.

Finally, it should be pointed out to this Court that both the first writ of habeas corpus and the present application for a second writ are entirely dilatory, presenting no issue of substance and even brought for the sole purpose of delay. What is significant is the fact that the first writ of habeas corpus was sued out on the eve of the relator's sched- [fol. 13] uled departure which was interrupted by the allowance of such writ. Now, relator and his attorney have been advised for several weeks that he was scheduled to be deported on the sailing of the SS Roma on May 19, 1953. Obviously, he is now seeking a second writ of habeas corpus and requests that the same be made returnable on May 21, 1953, with the design that he will thereby again interrupt his scheduled deportation.

All litigation must come to an end. The deportation proceedings herein have been pending since October 31, 1947. For almost six years the Government has been seeking to deport this relator who is admittedly in the United States illegally and who concededly has no defense to the deportation charge. Having reached the final stage he now again seeks to evade deportation by a multiplicity of litigation to which this Court should not lend itself by allowing another writ of habeas corpus.

Wherefore, it is respectfuly prayed that the petition for the issuance of a writ of habeas corpus herein be disallowed in all respects.

(S.) William J. Sexton.

Sworn to before me this 15th day of May, 1953. (S.) Julius Rolnitzky, Notary Public, State of New York, No. 41-3334300.

[fol. 14] In United States District Court

[Title omitted]

Transcript of Hearing

Before Hon. John W. Clancy, District Judge

New York,
May 16, 1953,
10:00 o'clock a. m.

Appearances

Jack Wasserman, Esq., Attorney for Relator.

J. Edward Lumbard, Esq., United States Attorney, for the Respondent, by William J. Sexton, Esq., and Nathan Skolnik, Esq., Assistant United States Attorneys.

Lester Friedman, Esq., Examiner, Immigration and Naturalization Service.

[fol. 15] Mr. Wasserman: This is a petition for a writ of habeas corpus and the petition alleges that the relator is a native and citizen of Italy who was ordered deported by the Board of Immigration Appeals in April 1953. He has 21 years residence in the United States. His wife is here, and he has a two-year old American born child.

Three grounds, and I might say that none of these three grounds was previously urged in the prior writ hearing, are urged for the grant of this writ, grant of this petition for habeas corpus, first, that the determination to deport and deny discretionary relief was based upon confidential information. I have set forth the basis for that at length in the petition, that the Attorney General had a confidential list of a hundred; that in October 1952, before the final order

of deportation had been entered here, it had been determined that this was one of the men, one of the hundred who had to be deported; and that the matter was prejudged even before there was a hearing before the Board of Immigration Appeals five months later.

There is only one case on the subject, directly in point, which holds that that violates the law, and that case is [fol. 16] Alexiou v. McGrath, 101 Fed. Supp. 421.

The Court: What violates the law?

Mr. Wasserman: The use of confidential information to determine discretionary relief, to determine whether to allow this man to adjust his status or to deport him.

Here is what Judge Youngdahl said in 101 Fed. Supp., and I am quoting from page 424:

> "Once the Attorney General has established the procedure affording an opportunity for a fair hearing as has been done here, then I do not believe his discretion can be exercised arbitrarily or capriciously in complete disregard of what appears on the record. These proceedings were infected with unfairness by a consideration of matters outside the record."

And I not only allege in the petition that the Attorney General and the Board of Immigration Appeals considered confidential information, I have alleged that matters——

The Court: What is he talking about, outside the record? Is he talking about the Commissioner rendering a decision on matters that are not in the record before him on the hearing?

[fol. 17] Mr. Wasserman: Yes, in determining discretionary relief, your Honor.

The Court: How could the Attorney General consider the record before him? That happened months after he reached his decision. What is he talking about?

Mr. Wasserman: I am not clear that I understand your Honor. We have the Attorney General's decision, the final decision on deportation——

The Court: I asked you what record he was talking about, and you said it was the record before him—Judge Youngdahl, is that right?

Mr. Wasserman: Judge Youngdahl found that in supporting the deportation as against Alexiou, in determining

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Mr. Wasserman: Judge Youngdahl found that in supporting the deportation as against Alexiou, in determining

whether or not they exercised discretionary relief, that the Attorney General denied discretion on the basis of matters outside the record.

The Court: What record?

Mr. Wasserman: The deportation record, the administrative deportation record, and that is what is alleged in this petition before your Honor. He goes on to say:

> "These matters were infected with unfairness by a consideration of matters outside the record. Any action based on such an unfair hearing is a nullity. If [fol.18] that were not so then we would be injecting into our own system of government the very principles of totalitarianism which we are today struggling to strike down. * * * The hearing on eligibility for suspension is tainted, ab initio, with unfairness, because evidence not of record was considered."

And then he found that the deportation order and the denial of discretionary relief were based upon unfairness and had to be set aside.

I rely upon that case. I also rely upon Kaloudis v. Shaughnessy, which was decided by this Circuit, 180 Fed. (2d) 489, where Judge Hand pointed out that if discretionary relief were considered upon the basis of matters that Congress did not intend the Attorney General to consider, that then there would be cause for complaint.

Ever since our 1917 Immigration Act was enacted, for over 20 years, we have always had discretionary relief determined on the administrative record. It is only in the past two years that there has been a change in practice.

Where Congress desired or authorized the Attorney General to consider matters outside the record, it expressly [fol. 19] stated so. Witness the cases of exclusion without a hearing upon confidential information. There it is specifically authorized.

So, you had two things: You had the administrative practice for over 20 years of always considering matters of record, and you have, in addition, the fact that Congress, where it wanted to authorize the Attorney General to consider matters outside the record, did so expressly.

We also allege in the petition that in similar cases, simi-

lar factual cases to this case, discretionary relief has been granted. As a matter of fact, in this very case, in 1945, the Attorney General considered this case a deserving case, one deserving of discretionary relief, and this man's record is as good today, if not better than it was in 1945. He has no criminal record since—for the past 10 years.

The Court: According to your petition, he was, as I remember it, he was granted leave to go and didn't go. Isn't that in his petition?

Mr. Wasserman: Yes, what has happened——

The Court: That is in the petition——

Mr. Wasserman: That is correct.

The Court: Then what are you crying about?

Mr. Wasserman: Paragraph 8 of the petition alleges in [fol. 20] all similar cases the Board of Immigration Appeals has exercised favorable discretion, and its refusal to do so herein constitutes an abuse of discretion. All he needed was one additional item of discretionary relief, known as seven proviso for the crime he committed in 1934. If that were granted, then he could go and get his visa in Canada, otherwise he could not, and it is because of that that he has been unable to adjust his status.

In Knauff v. McGrath, 181 Fed. (2d), 839, Justice Jackson had a similar situation before him, and he said as follows:

> "By the adoption of an invariable practice, he," meaning the Attorney General, "has established a class of situations with respect to which he has always so exercised that discretion as to suspend deportation. That classification is entirely reasonable. To depart from it in a single instance is to act arbitrarily or capriciously to abuse the administrative discretion."

That is what my petition says here. So on that second ground I believe this petition should be signed so this man can have a hearing upon this subject.

Then, finally, I allege that through adverse publicity, in- [fol. 21] stigated by the Attorney General himself, that he has made it impossible to grant fair consideration to this case by his subordinates, and you have the case of Delaney v. United States, 199 Fed. (2d), 107 where, because of ad-

verse publicity given by a Congressional Committee, it was held that it was impossible for a man to have a fair hearing.

The Court: In a certain place.

Mr. Wasserman: In a certain place, that is correct. Well, I think that applies all the more here because, when the Attorney General——

The Court: I don't think it means anything except on its own facts.

Mr. Wasserman: I think these facts are stronger because in that case it was a different arm of the Government.

The Court: What district is that? You just referred to the decision by Judge Jackson.

Mr. Wasserman: Knauff v. McGrath.

The Court: What district is that?

Mr. Wasserman: He was acting as Circuit Judge in this circuit, your Honor. Supreme Court Justice Jackson.

The Court: You mean that is the one where he granted [fol. 22] a writ when they were going to take her out on the plane?

Mr. Wasserman: That is correct.

The Court: Was that opinion published?

Mr. Wasserman: Yes, 181 Fed. (2d), 839.

The Court: Is that all?

Mr. Wasserman: Yes, your Honor.

I feel under these circumstances, because confidential information was used, because the case was prejudged, because in similar cases of the same facts, and the petition so alleges, discretionary relief has been granted, that there has been an unfair hearing here and an abuse of discretion which this Court can correct.

Mr. Sexton: Your Honor, we have prepared an affidavit in opposition to the issuance of the writ, which I should like to hand up to the Court. I point out to the Court that a week ago——

The Court: I will read this first.

Mr. Wasserman: May I have a copy of that?

Mr. Sexton: I am sorry. Yes.

(A pause.)

The Court: What publicity? Who is this brother? I never heard of him.

[fol. 23] Mr. Sexton: I don't know of any publicity my-

self, your Honor, except that around the time of Judge Noonan's writ it was reported in the papers that the writ had been dismissed and there was——

The Court: What is the notoriety about that?

Mr. Wasserman: Frankly, I think there should be no notoriety about him whatsoever. I think it is his brother concerning whom there has been notoriety.

The Court: Who is his brother?

Mr. Wasserman: Samuel Accardi against whom the Attorney General has instituted denaturalization proceedings, apparently on a claim that he is a racketeer. I would like to say to your Honor I have the mimeographed press releases of the Department of Justice concerning this case in my file.

Mr. Sexton: I don't know anything about the press releases, your Honor, but I did see in the paper last week that the Board of Immigration Appeals had denied his motion for a stay of deportation for six months, and prior to that I had seen a piece in The New York Times to the effect that he had actually been deported. As for any newspaper notoriety, that is, that I have seen in the New York papers, and I have read 75 per cent of them since this case started—— [fol. 24] The Court: That makes you a learned man.

Mr. Sexton: Not a learned man.

(A further pause.)

The Court: I will hear you.

Mr. Sexton: Your Honor, I want to point out to the Court that on May 5, which is a week ago this past Tuesday, Judge Noonan signed and entered an order dismissing a prior writ of habeas corpus, and the prior writ of habeas corpus encompassed and sought to achieve everything that is sought to be encompassed by this writ. The same question was presented to the Court.

The Court: What question?

Mr. Sexton: The fact that the administrative officials had abused their discretion in not granting suspension of deportation.

And on the prior writ Judge Noonan endorsed a short decision, a memorandum decision. He says, "A review of the record as a whole fails to demonstrate that there was present a clear abuse of discretion or a clear failure to exer-

cise discretion. Absent either element, this Court cannot review the exercise of discretion by the Board of Immigration Appeals. He cites the Adele case and continues, "The writ is accordingly dismissed and the relator remanded to [fol. 25] the custody of the respondent."

Exactly everything that has been brought up this morning except this business about confidential information and newspaper publicity.

I submit to the Court that the newspaper publicity, or whatever publicity my friend is referring to——

The Court: I agree with you on that.

Mr. Sexton:—had nothing to do with the Attorney General's determination.

As to the confidential information, my friend hasn't shown you the Attorney General utilized the confidential information, where or when he utilized it, and a reading of the decision of the——

The Court: That is so, isn't it, according to Judge Noonan? That is so, isnt' it, under Judge Noonan's decision?

Mr. Wasserman: No, there was nothing——

The Court: How do you know that he considered anything except what Judge Noonan has reviewed?

Mr. Wasserman: We were told in Washington, the prior counsel in this case was told in Washington, that this man's name was on this list of a hundred. I know from my own——

The Court: What about it? Supposing it was?

[fol. 26] Mr. Wasserman: Supposing? I am prepared to say that in any case, and in this case in particular, that in October, prior—1952—before the final order of deportation was rendered, the Attorney General placed his name on a confidential list of a hundred. It is a mimeographed list which was circulated to everyone in the Immigration Service. They were told, and I know it from my own experience of other cases, because I happen to represent other people on that list, you find it difficult to get adjournments of those cases, you are told, "We can't do anything for you because your client's name is on the list of a hundred." I understand that former counsel in this case spoke to the Commissioner and the Commissioner told him, "We can't do a thing in your case because the Attorney General has his

name on that list of a hundred." The result is, once your name got on that list of a hundred, and it was done in the secrecy of the Attorney General's office, you couldn't get the right time, no less get discretionary relief.

The Court: Judge Noonan has gone over the record.

Mr. Wasserman: But that was not before Judge Noonan. [fol. 27] The Court: What was not before him?

Mr. Wasserman: The fact that there was this list of a hundred.

The Court: Of course, it wasn't, and you couldn't put it before anybody. It is just one of your own ideas.

Mr. Wasserman: No, it is not. I think I am entitled to a hearing to establish that.

The Court: Establish what?

Mr. Wasserman: That there was this list of a hundred and there was confidential information used to determine this case, and I am ready to prove it.

The Court: But they didn't need it. Suppose there was a mountain of it ? The fact is they didn't need it, and they had a record which they submitted to Judge Noonan and he found that record was sufficient to support the decision.

Mr. Wasserman: But that doesn't——

Mr. Sexton: I might clarify it, your Honor. I was present and I myself told the judge who presided, Judge Noonan, that this man was on the Attorney General's proscribed list of alien deportees. I told it to him, so it was before Judge Noonan.

Mr. Wasserman: Yes, but counsel for the relator made [fol. 28] no point of it. I didn't have the Alexiou——

Mr. Sexton: It was before the Court.

Mr. Wasserman: ——case. There is the Government admitting that there was a proscribed list which was prepared in October of——

The Court: I have read your petition, by the way—and, talking about prejudgment, I suppose I oughtn't say I looked at it, but I did look at it—and I thought it was quite insufficient, and I think so now after hearing, and I am certainly not going to condemn any judge to listen to your assertions that are not borne out by anything. You can charge the Attorney General with having read the morning newspapers and having made up his mind on that, but the fact of the matter is—that is proved—that he had a record

Mr. Sexton: I might also point out——
before him on which he acted and the judge determined that it was sufficient to sustain him.

Mr. Wasserman: I think that to deny relief or to deny this man a hearing certainly flies in the face of the Alexiou case and certainly deprives him of a hearing. Here are the allegations, some of which have even been admitted by the Government——

The Court: I am going to refuse the writ.

[fol. 29] Mr. Wasserman: Will your Honor grant me a stay so I can apply to the Court of Appeals?

The Court: No, sir.

Do you want to take this and have it entered, Mr. Sexton?

Mr. Sexton: Yes, your Honor.

Mr. Wasserman: Is it at all possible for me to have these papers to present to the Court of Appeals? I don't know whether or not they are in session or whether I can get a judge today. I would like——

The Court: Will you do that for him?

Mr. Wasserman: ——to attempt to.

The Court: Go with Mr. Sweeney (a clerk) and when he has entered it, he will let you take them up there. Somebody will have to go or you will have to be responsible.

Mr. Wasserman: I am willing to do either one.

[fol. 30] In United States District Court

Notice of Appeal

The above named Joseph Accardi, relator herein, hereby appeals from the order of the District Court of May 16, 1953, denying relator's petition for habeas corpus.

Jack Wasserman, Attorney for Relator, Warner Building, Washington, D. C.; 35-55 73rd Street, Jackson Heights, L. I., New York.

To: United States Attorney.

[fol. 31] In United States District Court

[Title omitted]

Stipulation as to Record—May 29, 1953

It is hereby stipulated and agreed, that the foregoing is a true copy of the transcript of the record of the said District Court in the above entitled matter as agreed on by the parties.

Dated: New York, N. Y., May 29, 1953.

Jack Wasserman, Attorney for Relator-Appellant.

J. Edward Lumbard, U. S. Attorney, Attorney for Respondent Appellee.

[fol. 32] Clerks' Certificate to foregoing transcript omitted in printing.

[fol. 33] In United States Court of Appeals for the Second Circuit, October Term, 1952

No. 287

(Argued June 2, 1953. Decided August 11, 1953)

Docket No. 22750

United States of America, ex rel. Joseph Accardi, Relator-Appellant,

v.

Edward J. Shaughnessy, District Director of the Immigration and Naturalization Service, New York District, Department of Justice, Respondent-Appellee

Before Swan, Clark and Frank, Circuit Judges

Appeal from the United States District Court for the Southern District of New York, Clancy, Judge

This appeal brings up an order denying a petition for issuance of a second writ of habeas corpus to review an administrative refusal to suspend deportation of the appellant. Order affirmed.

[fol. 34] Jack Wasserman, Attorney for appellant; Irving Radar, of Counsel.

J. Edward Lumbard, United States Attorney, for appellee; William J. Sexton, Assistant United States Attorney, of Counsel.

OPINION

SWAN, Circuit Judge:

This appeal presents the question whether the District Judge erred in refusing to issue a second writ of habeas corpus to review a decision of the Board of Immigration Appeals which denied the application of a deportable alien for suspension of deportation pursuant to section 19 of the Immigration Act of 1917 as amended, 8 U. S. C. A. § 155(c), of which the relevant portion reads as follows:

> "In the case of any alien * * * who is deportable under any law of the United States and who has proved good moral character for the preceding five years, the Attorney General may * * * suspend deportation of such alien * * * if he finds that such deportation would result in serious economic detriment to a citizen or legally resident alien who is the spouse, parent or minor child of such deportable alien. * * *[1]

The appellant is an alien of Italian nativity and citizenship who entered the United States in 1932 with intent [fol. 35] to remain permanently and without possessing an

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[1] This statute was repealed by the Immigration and Nationality Act of June 27, 1952, effective 180 days thereafter, and the provisions as to discretionary suspension of deportation were replaced by section 244 of the 1952 Act, 8 U. S. C. A. § 1254. However, the "savings clauses" of the later Act, kept the earlier statute alive for pending proceedings, and provided that "An application for suspension of deportation under section 19 of the Immigration Act of 1917, as amended * * * which is pending on the date of the enactment of this Act, shall be regarded as a proceeding within the meaning of this subsection." P. L. 414, § 405(a), 66 Stat. 280. The appellant's application was pending until the Board of Immigration Appeals rendered its decision on April 3, 1953.

immigration visa. He has resided here continuously since entry, was married in 1949 to a legally resident alien, and has a two year old American-born child. Proceedings for his deportation were instituted in 1947 and, after a hearing, he was found deportable on the charge of illegal entry without an immigration visa. The proceedings were later reopened to receive further evidence concerning his application for suspension of deportation. Such discretionary relief was denied by the hearing officer in May 1952. His decision was thereafter adopted by the Acting Commissioner and was affirmed by the Board of Immigration Appeals on April 3, 1953. The Board's opinion reviewed the evidence and concluded with the statement: "After consideration of all the facts and circumstances in the case, we believe that the applications for relief should be denied as a matter of administrative discretion." Thereafter the appellant was taken into custody for deportation and he promptly sued out a writ of habeas corpus which Judge Noonan dismissed by order entered May 5, 1953.[2] This order was not appealed.[3] On May 16 the petition for issuance of a second writ was presented. This petition, like that on which the first writ issued, attacks only the Board's denial of discretionary relief. The charge on which the appellant has been found deportable is admitted. The case was heard on affidavits and oral argument without testimony being taken. Judge Ciancy refused to issue the writ. Deportation has been stayed pending determination of the appeal from such refusal.

[fol. 36] An order dismissing one writ of habeas corpus does not formally estop the relator from suing out another

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[2] Judge Noonan's memorandum decision reads: "A review of the record as a whole, fails to demonstrate that there was present a clear abuse of discretion or clear failure to exercise discretion. Absent either element this court cannot review the exercise of discretion by the Board of Immigration Appeals. (United States ex rel. Adel v. Shaughnessy, 183 F. 2d 371.)"

[3] The appellant's brief on the present appeal admits that dismissal of the first writ was correct.

on the same grounds.[4] Nevertheless it may properly be given controlling weight if the same grounds are urged in a second writ.[5] The appellant contends that the second petition alleged new grounds of attack upon the administrative denial of suspension of deportation, namely, that the Board of Immigration Appeals improperly exercised its discretion (1) because it considered confidential information and other material outside the record, (2) because the case had been prejudged by the Attorney General, and (3) because other aliens similarly situated had been granted discretionary relief. These grounds were not alleged in the first petition. Ground (1) is alleged in paragraphs 11-16, ground (2) in paragraph 19, and ground (3) in paragraphs 9-10 of the second petition; they are printed in the margin.[6] These charges, alleged upon information and

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[4] *Salinger* v. *Loisel*, 265 U. S. 224, 230; *United States* v. *Thompson*, 2 Cir., 144 F. 2d 604, 606, cert. den. 323 U. S. 790.

[5] *Wong Doo* v. *United States*, 265 U. S. 239, 241; *United States* v. *Thompson, supra; United States ex rel. Karpathiou* v. *Jordon*, 7 Cir., 153 F. 2d 810, cert. den. 328 U. S. 868.

[6] "9. That on April 6, 1945, favorable discretionary relief was exercised herein in the form of voluntary departure and preexamination, but my husband was unable to take advantage of this because the American Consul refused to issue a visa to him on the ground that he had been convicted of a crime in 1934.

10. That the aforesaid criminal ground may be waived by the Board of Immigration Appeals and in all similar cases has been waived by the Board of Immigration Appeals.

11. Upon information and belief that the Department of Justice maintains a confidential file with respect to my husband.

12. Upon information and belief that on or about October 2, 1952, the Attorney General announced at a press conference that he planned to deport certain so-called 'unsavory characters.'

13. That upon information and belief, on or about October 2, 1952, the Attorney General prepared a list of one

belief, were categorically denied in an opposing affidavit [fol. 37] which also incorporated by reference the administrative record. There is absolutely nothing in that record to indicate that the administrative officials considered anything outside the record. Indeed the October 1952 list of "unsavory characters" and the press conference concerning it occurred months after the hearing officer's decision and

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hundred individuals whose deportation he sought in accordance with the announcement made at his press conference of October 2, 1952.

14. Upon information and belief, that included in this list of one hundred persons was the name of my husband, Joseph Accardi.

15. Upon information and belief, that the aforesaid list of one hundred individuals, including the name of my husband, was circulated by the Department of Justice among all its employees connected with the Immigration Service and the Board of Immigration Appeals.

16. Upon information and belief, that because of the listing of my husband's name on this confidential list and because of consideration of matters outside the record of his immigration hearing, discretionary relief has been denied to permit my husband to adjust his immigration status to that of a permanent resident.

17. That application was made during the month of May, 1953, for reconsideration of my husband's case and such reconsideration has resulted in a reaffirmance of the order of deportation herein.

18. Upon information and belief that the Attorney General has issued several press releases with regard to my husband's case during the month of April, 1953, and because of the unfavorable publicity accorded to this case at the instigation of the Attorney General, it has not been possible to secure a fair reconsideration and rehearing of this matter.

19. That the decision to deny favorable discretionary relief herein was pre-judged by the Attorney General on October 2, 1952, when he included my husband's name in the list of one hundred so-called 'unsavory characters' and since that time it has been impossible for my husband to secure fair consideration of his case."

the Assistant Commissioner's adoption of it, and could not have influenced them. The Board's opinion discusses only the evidence in the record, and such evidence was amply sufficient to support discretionary denial of suspension of deportation. As this court said in *United States ex rel. Kaloudis* v. *Shaughnessy*, 180 F. 2d 489, 490, an alien has no privilege of inquiring into the grounds on which the Attorney General has denied suspension of deportation; "un- [fol. 38] less the ground stated is on its face insufficient, he must accept the decision, for it was made in the 'exercise of discretion,' which we have again and again declared that we will not review." In this respect the case at bar is unlike *Alexiou* v. *McGrath* (D. C. D. C.), 101 F. Supp. 421, where it affirmatievly appeared that evidence not of record was considered on the issue of eligibility for suspension of deportation.

We may assume *arguendo*, as we did in *United States ex rel. Weddeke* v. *Watkins*, 166 F. 2d 369, 371, cert. den. 333 U. S. 876, that since the Attorney General has provided by regulations the procedure by which a deportable alien is accorded a hearing on his application to suspend deportation, that he is entitled to procedural due process in the conduct of such hearing; that is, the requirements of a fair hearing must be met.[7] Nothing alleged in the petition for a second writ suggests that such requirements were not observed in the initial hearing or in the affirmance of the hearing officer's decision by the Assistant Commissioner of Immigration. The relator alleges "belief," based on the existence of the subsequently created list of undesirable aliens, that the Board of Immigration Appeals was influenced by this list in affirming the decision denying suspension. The allegation that the Attorney General had prejudged the application for discretionary relief by including the appellant's name in the October 1952 list is substantially only a reiteration of the first ground of complaint. That the Board considered matters outside the

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[7] See also *United States ex rel. Giacalone* v. *Miller* (S. D. N. Y.), 86 F. Supp. 655, 657; *United States ex rel. Bauer* v. *Shaughnessy*, S. D. N. Y. Civ. 50-217, 1949, unreported; *Chavez* v. *McGranery* (S. D. Cal.), 108 F. Supp. 255.

record was denied by the opposing affidavit, and the Board's opinion appears to corroborate such denial. In the opinion of a majority of the court, the assertion of a mere sus- [fol. 39] picision or "belief" that the Board considered other matters did not require the issuance of a second writ. Were this enough, every deportable alien would so allege, merely to delay his justifiable deportation.

The third ground of complaint, that "in all similar cases" the Board had exercised its discretion in favor of deportable aliens convicted of crime is completely without merit. Suspension of deportation is a discretionary matter. In the exercise of its discretion it is permissible for the Board to take into account the alien's earlier bad conduct. *United States ex rel. Adel* v. *Shaughnessy,* 2 Cir., 183 F. 2d 371. The facts set out in the Board's opinion respecting his criminal record and his tenuously explained affluence were ample justification for denial of discretionary relief. Nor does the allegation that the appellant was treated differently from other aliens similarly situated raise a triable issue of fact. Determination of what weight to give to a prior conviction of crime necessarily depends upon the circumstances of the particular case. No two cases can be precisely similar. The appellant tries to bring himself within the scope of *United States ex rel. Knauff* v. *McGrath,* 2 Cir., 181 F. 2d 839, vacated as moot, 340 U. S. 940, where it was alleged that the uniform practice was to defer deportation in all cases where a bill of relief was pending in Congress. There the uniform practice was a provable fact. It is not such when, as here, the alleged uniform practice relates to the appraisement of the moral reformation of convicted deportees.

Order Affirmed.

[fol. 40] FRANK, Circuit Judge (dissenting):

I dissent because I think the district judge erred in refusing to hear testimony offered by the relator, to show that the hearing before the Board was a farce.

Suppose the Supreme Court were secretly to notify all judges of inferior federal courts that in the future it would reverse all judgments they entered if favorable to certain designated persons. Accardi's wife (in the second habeas

corpus petition) asserts that we have here something of that sort—but worse. Let us see:

By a valid regulation,[1] having the effect of a law,[2] the Attorney General has provided that one who applies for discretionary relief under the statute shall receive a hearing before the Board of Immigration Appeals on his appeal from a decision, adverse to the applicant, made by the Commissioner or Acting Commissioner. Another regulation provides that the Attorney General may review and reverse any decision made by the Board.[2a] These regulations—which, while they stand, bind the Attorney General and his subordinates[3]—mean, I think, that decision by the Board or the Attorney General as to the grant or refusal of such relief must not be made until after a hearing by the Board.[4] If it can be shown that, as the relator alleged in the second petition for habeas corpus, the decision adverse to discretionary relief in Accardi's case was made by the Attorney General in 1952 before Accardi had had a Board hearing (in 1953), so that the purported Board [fol. 41] hearing was but a sham, then it will appear that discretion has not been exercised as required by the regulation. In that event, habeas corpus should be granted, unless within a reasonable time an administrative decision is made on the basis of a Board hearing in accordance with the regulation and without regard to the pre-hearing decision by the Attorney General. See *United States ex rel. Mastrapasqua* v. *Shaughnessy*, 180 F. (2d) 999, 1003-1004 (C. A. 2). For while courts cannot review the exercise of administrative discretion nor themselves exercise it, they can and should compel its exercise where the officer vested with

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[1] 8 C. F. R. (1949 ed. Pocket Part) §§ 150.7(a), (b), 150.11(b), 150.13(b), and Part 151, esp. §§ 151.2(c), 151.3(e), 151.5(e); note *infra*.

[2] See, e. g., *Boske* v. *Commagore*, 177 U. S. 459; *U. S. ex rel. Mastrapasqua* v. *Shaughnessy*, 180 F. (2d) 999, 1001 (C. A. 2).

[2a] 8 C. F. R. (1949 ed.) §§ 90.3, 90.12; *cf.* 8 C. F. R. (Rev. ed. 1952) § 1.2.

[3] See, e. g., *Bridges* v. *Wixon*, 326 U. S. 135, 153.

[4] Cf. *Alexiou* v. *McGrath*, 101 F. Supp. 421.

the discretion has failed to do so. *United States ex rel. Mastrapasqua* v. *Shaughnessy, supra,* at 1002.

Relator alleged in the second habeas corpus petition that the pre-hearing decision consisted of the inclusion of Accardi's name in a secret list of aliens whom the Attorney General had decided must be expelled from the United States, this secret list having been circulated in October 1952 among all the Attorney General's subordinates in the Department of Justice, including the Board, and having since been approved with reference to Accardi by the present Attorney General—all previous to the administrative hearing on Accardi's petition for discretionary relief. Relator argues, in effect, that, since the Attorney General was the Board's superior, and since he could reverse any decision made by the Board concerning such relief,[5] his issuance in 1952 of the secret list obliged the Board in 1953 to refuse to exercise its discretion in Accardi's favor,[6] and

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[5] See note 2a, *supra.*

[6] Pertinent allegations of the petition were:

"12. Upon information and belief that on or about October 2, 1952, the Attorney General announced at a press conference that he planned to deport certain so-called 'unsavory characters.'

"13. That upon information and belief, on or about October 2, 1952, the Attorney General prepared a list of one hundred individuals whose deportation he sought in accordance with the announcement made at his press conference of October 2, 1952.

"14. Upon information and belief, that included in this list of one hundred persons was the name of my husband, Joseph Accardi.

"15. Upon information and belief, that the aforesaid list of one hundred individuals, including the name of my husband, was circulated by the Department of Justice among all its employees connected with the Immigration Service and the Board of Immigration Appeals.

"16. Upon information and belief, that because of the listing of my husband's name on this confidential list and because of consideration of matters outside the record of his immigration hearing, discretionary relief has been de-

[fol. 42] compelled it to act without considering the countervailing evidence, *e. g.*, that Accardi has lived in the United States for 21 years, is the husband of a lawful resident of the United States and the father of a two-year-old American-born child. Respondent, in his traverse in the district court, denied the allegation of prejudgment. But relator's counsel proposed in the district court to prove the contrary by evidence to be adduced in court. He proposed to prove, not only the specific facts alleged in the habeas corpus petition concerning the Attorney General's prejudgment, but also that Accardi's former counsel had been told by the Commissioner, "We can't do a thing" in Accardi's case "because the Attorney General has his name on that list."[7] Yet the district judge refused to hear any testimony, *i.e.*, refused to conduct a trial to determine whether relator's allegations or respondent's denials were true.

[fol. 43] Obviously, we would reverse if the Board in its opinion had said: "We deny relief because the Attorney General has already decided, previous to the application for relief, that Accardi is not to receive any discretionary relief." So the crucial question here is whether relator had a right to prove, by evidence outside the record, that in truth such was the ground of the Board's action. My colleagues,

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nied to permit my husband to adjust his immigration status to that of a permanent resident. * * *

"19. That the decision to deny favorable discretionary relief herein was pre-judged by the Attorney General on October 2, 1952, when he included my husband's name in the list of one hundred so-called 'unsavory characters' and since that time it has been impossible for my husband to secure fair consideration of his case.

"20. That the present Attorney General has continued the policies and practices of his predecessor with reference to my husband's case."

[7] Relator's counsel, on the hearing of the petition, said he understood "that former counsel in this case spoke to the Commissioner and the Commissioner told him, 'We can't do a thing in your case because the Attorney General has his name on that list of a hundred.'"

accepting the district judge's view, take this position: Even if it is a fact that Accardi's application for relief was unlawfully prejudged by the Attorney General so that the Board's hearing was a pure pretense, nevertheless no court can pay any attention to that fact. Why? Because, so my colleagues maintain, (1) the record of the administrative hearing and the opinion of the Board contain no reference to the Attorney General's list, and, on their face, disclose nothing to indicate any irregularity; (2) the courts lack power to go behind such an administrative record; (3) relator's allegations as to the Attorney General's prejudgment are "on information and belief."

I cannot agree. Respondent's "nice, sharp quillets of the law" should not take us in. There is no doctrine that a court may never go outside such an official record to discover whether an official himself unlawfully acted on matters outside the record. Having served for a considerable period as an administrative officer, I am fairly callous to the cries of men who denounce all such officers as power-hungry bureaucrats, and I am perhaps unusually aware of the danger to the workings of government if any administrative officer could be dragged into court, to stand trial, on a mere suspicion of impropriety behind the scenes. However, there would be greater danger to democratic government in judicial acceptance of every administrative record as final and invulnerable, no matter how grave and serious the charges against the official.

[fol. 44] While ordinarily a court must confine itself to the administrative record,[8] there are exceptions. Even a court's judgment, valid so far as the judicial record goes, will be vacated years later if it be then proved, by evidence entirely beyond the bounds of the record, to have been procured by bribery of a judge. *Root Refining Co.* v. *Universal Products Oil Co.*, 169 F. 2d 514 (C. A. 3). And the same doctrine applies if the judgment resulted from what amounts to a judge's decision of a case made before it

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[8] *United States* v. *Morgan*, 313 U. S. 409, 422; *Chicago, B. & O. R. Co.* v. *Babcock*, 204 U. S. 588, 593; *Fayerweather* v. *Ritch*, 195 U. S. 276, 306-307.

began.[9] Ours would be a sorry legal system if it completely shielded from attack a judge's or other official's order simply because the facts revealing its illegality are not in the official record on which the order purports to rest. To confer such immunity would be to make legality a matter of sheer ritualism, of mere outward looks. That way lies tyranny.

My colleagues say that "there is absolutely nothing in the record to indicate that the administrative officials considered anything outside the record." But the same was true in the *Root Refining* case, *i.e.*, the record was obviously silent as to the bribery of the judge which brought about the decision, since necessarily that was a secret fact—in that respect like the Attorney General's list. Moreover, relief by habeas corpus inherently involves judicial reliance on facts not in the record supporting the judgment which habeas corpus collaterally attacks.[9a]

Of course, an attack on an official's decision, by recourse to off-the-record evidence, is not allowed if the allegations are vague. Legality should be more than well-ordered paper work, but allowable peering behind the paper facade [fol. 45] has its limits. One may not compel an official to submit to courtroom interrogation in the search for possible concealed, unlawful behavior, unless one first brings forward some striking traces of it. As a consequence, well-concealed misconduct may escape judicial correction.[10] That is the price we pay to avoid having governmental action at the mercy of anyone who voices mere suspicions. For instance, to open up the judgment in the *Root Refining* case, it would not have sufficed to allege, without more, "The judge was bribed." There must be an offer to prove specific facts which will pretty plainly impugn the official record.

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[9] See *Schwab* v. *Coleman*, 145 F. (2d) 672 (C. A. 4).

[9a] See *Moore* v. *Dempsey*, 261 U. S. 86.

[10] See, e. g., *Broadcast Music* v. *Havana Madrid Restaurant Corp.*, 175 F. (2d) 77, 80 (C. A. 2).

Relator here satisfied that requirement: Not only did she offer proof of the Attorney General's list—a secret, official document of marked evidentiary significance tending strongly to show that the Attorney General had stripped the Board of discretion in Accardi's case—but she also offered to prove that the Commissioner of Immigration had said to Accardi's counsel that such was the purpose and effect of including Accardi's name in that list.

Finally, I disagree with my colleagues when they say that no attention may be paid to the allegation of secret prejudgment by the Attorney General because it is made on information and belief. Surely we would not refuse to act in a case like *Root Refining* on a sufficiently specific charge that a judge had been bribed to decide the case, merely because the facts, necessarily not within the first-hand knowledge of the party so charging, were stated on such information and belief. In a variety of circumstances, it has been held that such an allegation suffices where, as here, the asserted facts are thus not within affiant's personal [fol. 46] knowledge.[10a] I think the district court should be directed to afford relator an opportunity to prove those facts, just as in the *Root Refining* case the Supreme Court ordered a trial of the movant's charge of bribery.[11] I do not for a moment intimate that relator's allegations are true; I urge only that we ought not now assume that they are false. It will not do, I think, to hold it enough that the outside of the administrative cup is clean.[12]

[10a] See, e. g. *Berger* v. *United States*, 255 U. S. 22, 34-5; *Kelly* v. *United States*, 250 Fed. 947, 948-9 (C. A. 9); *Creekmore* v. *United States*, 237 Fed. 743 (C. A. 8).

[11] *Universal Oil Co.* v. *Root Refining Co.*, 328 U. S. 575, 580.

[12] "For ye make clean the outside of the cup and platter, but within they are full of extortion and excess." Matt. 23, 25.

[fol. 47] In United States Court of Appeals for the Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 11th day of August one thousand nine hundred and fifty-three.

Present: Hon. Thomas W. Swan, Chief Judge, Hon. Charles E. Clark, Hon. Jerome N. Frank, Circuit Judges.

United States ex rel. Joseph Accardi, Relator-Appellant,

v.

Edward J. Shaughnessy, District Director of Immigration & Naturalization, Respondent-Appellee

Judgment—Filed August 11, 1953

Appeal from the United States District Court for the Southern District of New York

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Alexander M. Bell, Clerk.

[fol. 48] [File endorsement omitted.]

[fol. 49] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 50] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1953

No. 366

UNITED STATES OF AMERICA, EX REL. JOSEPH ACCARDI, Petitioner

vs.

EDWARD J. SHAUGHNESSY, District Director of the Immigration and Naturalization Service, etc.

ORDER ALLOWING CERTIORARI—Filed November 16, 1953

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(1937)